

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT NUMBER 76LJ-)	FINAL
11695900 BY DAVID A. WILKINS)	ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 25, 2002, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76LJ-11695900 is ISSUED to David A. Wilkins to appropriate 135 gallons per minute (gpm) up to 55.08 acre-feet of water per year from groundwater. The water is to be diverted at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 07, Township 28 North, Range 19 West, Flathead County, Montana. The means of diversion is a well. The purpose includes multiple domestic for seven homes with a period of diversion of January 1 through December 31, inclusive, of each year; and lawn and garden irrigation of 19.23 acres with a period of diversion of May 1 through September 30, inclusive, of each year. The domestic place of use is located in the SE $\frac{1}{4}$ of Section 07, Township 28 North, Range 19 West, Flathead County, Montana. The lawn and garden irrigation place of use is located in 3.04 acres in parcel 1 in the W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 4.40 acres in parcel 2 in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.77 acres in parcel 3 in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 2.78 acres in parcel 4 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$,

0.54 acres in parcel 5 in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.70 acres in parcel 6 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 5.00 acres in parcel 7 in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 07, Township 28 North, Range 19 West, Flathead County, Montana.

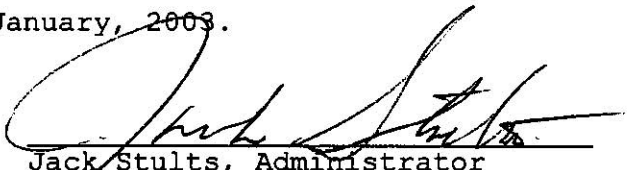
A. Permittee shall install a valve capable of regulating the flow pumped from the well, and a flowmeter with volume totalizer in the pump house capable of measuring the total flow and volume pumped from the well. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 16th day of January, 2003.


Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 16th day of January, 2003.

HOWARD WILKINS
215 BROWNS GULCH
KALISPELL MT 59901

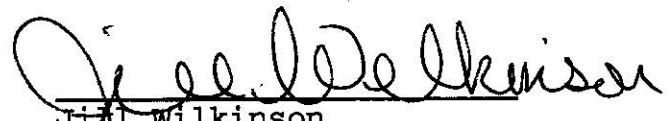
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NUMBER) PROPOSAL FOR DECISION
76LJ-11695900 BY DAVID A. WILKINS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on November 7, 2002, in Kalispell, Montana, to determine whether a beneficial water use permit should be issued to David A. Wilkins, hereinafter referred to as "Applicant" for the above applications under the criteria set forth in Mont. Code Ann. § 85-2-311.

APPEARANCES

Applicant appeared at the hearing and testified in his own behalf. Marc M. Spratt, Senior Hydrogeologist, RLK Hydro, Inc., testified for the Applicant.

Objector Clara and George Tennant, and Objector Joan and Thomas Frank appeared at the hearing in their own behalf. Clara Tennant; Thomas Frank; and Kyle Flynn, Water Resources Scientist, Clear Creek Hydrology, Inc. testified for the Objectors.

Wes McAlpin, Water Resources Specialist with the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) attended the hearing but was not called to testify.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered seven exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit 1-7.

Applicant's Exhibit A1 is a one-page well location map.

Applicant's Exhibit A2 is a one-page geology map of the area.

Applicant's Exhibit A3 is a one-page map of the Shallow Alluvium in the area.

Applicant's Exhibit A4 is a one-page surficial geology map of the area.

Applicant's Exhibit A5 is a one-page map of the Deep Aquifer Potentiometric Surface in the area.

Applicant's Exhibit A6 is a one-page topographic map showing the Peters Creek Watershed.

Applicant's Exhibit A7 is a one-page cross section showing the stratigraphy of valley-fill units in the Kalispell valley.

Objectors offered two exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibit 1-2.

Objectors' Exhibit O1 is a two-page letter from Mr. Kyle Flynn.

Objectors' Exhibit O2 is a two-page letter from Mr. Mark Henry.

PRELIMINARY MATTERS

The Parties stipulated that the only criteria at issue are physical availability, legal availability, adverse affect, and beneficial use. Adequacy of diversion and operation, and possessory interest criteria are not at issue.

Objector Tennant and Objector Frank jointly presented their exhibits and called Mr. Flynn as a witness in this matter.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit 76LJ-11695900 in the name of and signed by David A. Wilkins was filed with the Department on September 5, 2001. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 135 gallons per minute (gpm) up to 55.08 acre-feet of water per year from groundwater. The water is to be diverted at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 07, Township 28 North, Range 19 West, Flathead County, Montana. The proposed means of diversion is a well. The proposed use includes multiple domestic for seven homes with a period of diversion of January 1 through December 31, inclusive, of each year; and lawn and garden irrigation of 19.23 acres with a period of diversion of May 1 through September 30, inclusive, of each year. The proposed domestic place of use is located in the SE $\frac{1}{4}$ of Section 07, Township 28 North, Range 19 West, Flathead County, Montana. The proposed lawn and garden irrigation place of use is located in 3.04 acres in parcel 1 in the W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 4.40 acres in parcel 2 in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.77 acres in parcel 3 in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 2.78 acres in parcel 4 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.54 acres in parcel 5 in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.70 acres in parcel 6 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 5.00 acres in parcel 7 in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 07, Township 28 North, Range 19 West, Flathead County, Montana. (Department file)

Physical Availability

4. Applicant pumped the well at 135 gpm for eight hours and measured no drawdown in the pumping well. Zero drawdown indicates the aquifer was not stressed at the pumping rate and indicates that water will be available when the well is pumped longer than eight hours. (Department file, testimony of Marc Spratt)

5. Objector Frank's well water turns brown when used for lawn watering. What causes the discoloration is not known. However, water is still available for use and the Franks continue to use the brown water in spite of the discoloration. (Testimony of Thomas Frank)

Legal Availability

6. Applicant's well is in a fractured limestone bedrock aquifer and Objectors' wells are in a shallow alluvium aquifer on the east side of the Flathead Valley. The degree of connection between the aquifers is minimal, if any. The degree of connection is based upon long term studies (up to 30 days) performed on the west side of the Flathead Valley near Somers, Montana, in the same fractured limestone bedrock aquifer and the shallow alluvium aquifer. The purpose of these tests was to determine the degree of connection between the aquifers and determine if pumping in one aquifer would cause an existing contaminant plume in the other to migrate. (Testimony of Marc Spratt)

7. Applicant performed an eight-hour pump test at the requested flow rate of 135 gpm and the water level in the pumping well did not drop. When the pumping water level does not change in the pumping well, there will be no impact on neighboring wells within the same or connected aquifers. (Department file, testimony of Marc Spratt)

8. Applicant also assumed the bedrock and alluvial aquifers are connected to investigate a worst-case scenario. Under this scenario of assumed connection and three days of continuous pumping at 135 gpm the impact to Objector Frank's well water level is 0.24 feet. The projected impact to Objector Tennant's well water level is 0.11 feet. Objectors' wells have sufficient water depth to accommodate additional drawdown of this amount according to their well logs. (Testimony of Marc Spratt)

9. Objectors have not experienced water level problems in their wells that have prevented them from exercising their water rights. There is adequate water in Objectors' wells to accommodate a three inch drop in water level. (Testimony of Clara Tennant, Thomas Frank, Marc Spratt)

Adverse Effect

10. Applicant plans to install a valve to control withdrawals, if necessary, if prior appropriations are not satisfied during times Applicant is appropriating water. Applicant's contingency plan to control the appropriation in the event existing rights are not satisfied includes adding storage, in addition to the individual pressure tanks located at each residence, and scheduling pumping time from the well. (Department file, testimony of Applicant, Marc Spratt)

Adequacy of Appropriation Works

11. Applicant used a licensed well contractor to drill and construct the well. (Department file)

12. Applicant used a consulting firm knowledgeable in hydrogeology and water system design to prepare a preliminary design. The preliminary design predicted the pump size requirements based upon preliminary pipe size estimates. The project design was not detailed, but is adequate to show the appropriation works are adequate to appropriate the requested water for the proposed purposes. (Department file, testimony of Applicant, Mark Spratt)

13. Applicant plans to install a valve and flowmeter with volume totalizer in the pump house to assure the flow rate and volume permitted is not exceeded. (Department file, testimony of Marc Spratt)

Beneficial Use

14. Applicant used Department domestic use standards to determine the volume of water required for seven residences. Applicant applied the Department volume standard of 2.5 acre-feet per acre (af/ac) for lawn and garden irrigation to the total number of acres (19.23 acres) of lawn and garden proposed for each of the seven proposed residences. Objectors' estimated the annual volume of water required for acreage that is half grass and half orchard (to estimate lawn and garden needs) for this climatic area, taking precipitation into account, to be 2.3 af/ac, very close to the Department standard. The Department

standard is reasonable for this area. (Department file, testimony of Marc Spratt, Kyle Flynn)

15. Applicant requests 10 gpm for each domestic use or 70 gpm for all domestic uses. Ten gallons per minute per household is a reasonable flow rate for this purpose. Applicant used the flow rate per acre from another application of four gallons per minute per acre¹ to estimate the required lawn and garden irrigation flow rate. For the 19.23 acres of lawn and garden the flow rate of 76.92 gpm² is required. The requested daily lawn and garden irrigation volume can be delivered in 12.6 hours at the requested rate of 135 gpm. The combined flow rate estimated needs are 147 gpm³. The application request of 135 gpm is reasonable. (Department file, testimony of Marc Spratt, Kyle Flynn)

16. Objectors' concern is not with the flow rate and volume requested for the lawn and garden portion of the request. Objectors contend a lawn and garden of five acres in size may set a precedent for excessively large lawns. Applicant based requested lawn and garden size on gross lot size and topography of the individual lots. Smaller lots have smaller lawns and larger lots have larger lawns. Large lawns five acres in size are common in the Flathead Valley. Five-acre lawns constitute a beneficial use. (Testimony of Clara Tennant, Thomas Frank, Marc Spratt)

Possessory Interest

17. Applicant has a possessory interest in the property where the water is to be put to beneficial use. Applicant has exclusive property rights in the groundwater development or the written consent of the person with those rights. (Department file)

Water Quality Issues

18. No objections relative to water quality were filed against this application nor were there any objections relative to water

¹ Neill Application: 80 gpm for 20 acres=4 gpm/ac

² 19.23 ac * 4 gpm/ac=76.92 gpm

³ 70 gpm + 76.92 gpm=147 gpm

classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).
2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit

will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Even though the well was not test pumped longer than eight hours at the requested flow rate, the static pumping water level during the test indicates pumping at 135 gpm does not stress the aquifer. Mont. Code Ann. § 85-2-311(1) (a) (i). See Finding of Fact No. 4.

4. The Applicant has proven that water can reasonably be considered legally available. The requested water is not destined for an existing legal demand because the level of water in the aquifer does not change in Applicant's well when pumped at the requested rate. Therefore, existing leakage between aquifers or area surface waters, if any, will not change. Applicant recognized that the degree of connection and amount of leakage may be different at this location on the east side of the valley, as opposed to the testing in Somers on the west side of the valley. Applicant then used drawdown projection techniques to estimate drawdown to Objectors wells as if there is a connection between the aquifers. The projected drawdown is about three inches and Objectors' wells have sufficient water levels in their wells to accommodate this drawdown if it occurs. Mont. Code Ann. § 85-2-311(1) (a) (ii). See Finding of Fact Nos. 6, 7, 8, 9.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Applicant has a plan for the exercise of their appropriation that demonstrates that the applicant's use of the water will be controlled so the water rights of prior appropriators will be satisfied. Applicant's plan requires a valve and flow meter to control or shut off the flow of water from the well if existing legal demands are not satisfied. Mont. Code Ann. § 85-2-311(1) (b). See Finding of Fact Nos. 10, 13.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact Nos. 11, 12, 13.

7. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. The acreage of the lawns to be irrigated must benefit the appropriator and not waste water. Mont. Code Ann. §§ 85-2-102(2)(a), 312(1). Here there is no evidence that the requested lawn and garden acreage does not benefit the Applicant or that water will be wasted. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact Nos. 14, 15.

8. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact No. 17.

9. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See, Finding of Fact No. 18.

10. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Objectors presented little evidence to show the criteria for issuance of a permit are not met. Applicant has met the criteria for issuance of a permit without more than standard conditions and the condition requiring a valve and flow meter to control or shut off the flow. Mont. Code Ann. § 85-2-312. See Conclusions of Law Nos. 3, 4, 5, 6, 7, 8, 9.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76LJ-11695900 is **ISSUED** to David A. Wilkins to appropriate 135 gallons per minute (gpm) up to 55.08 acre-feet of water per year from groundwater. The water is to be diverted at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 07, Township 28 North, Range 19 West, Flathead County, Montana. The means of diversion is a well. The purpose includes multiple domestic for seven homes with a period of diversion of January 1 through December 31, inclusive, of each year; and lawn and garden irrigation of 19.23 acres with a period of diversion of May 1 through September 30, inclusive, of each year. The domestic place of use is located in the SE $\frac{1}{4}$ of Section 07, Township 28 North, Range 19 West, Flathead County, Montana. The lawn and garden irrigation place of use is located in 3.04 acres in parcel 1 in the W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 4.40 acres in parcel 2 in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.77 acres in parcel 3 in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 2.78 acres in parcel 4 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.54 acres in parcel 5 in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.70 acres in parcel 6 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, 5.00 acres in parcel 7 in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 07, Township 28 North, Range 19 West, Flathead County, Montana.

A. Permittee shall install a valve capable of regulating the flow pumped from the well, and a flowmeter with volume totalizer in the pump house capable of measuring the total flow and volume pumped from the well. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

NOTICE

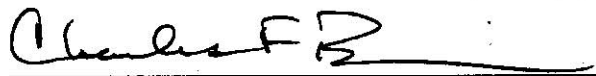
This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral

argument must be filed with the Department by December 16, 2002, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by January 6, 2003, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of timely oral argument requests, exceptions, responses, and briefs.

Dated this 22nd day of November, 2002.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 25th day of November, 2002.

HOWARD WILKINS
215 BROWNS GULCH
KALISPELL MT 59901

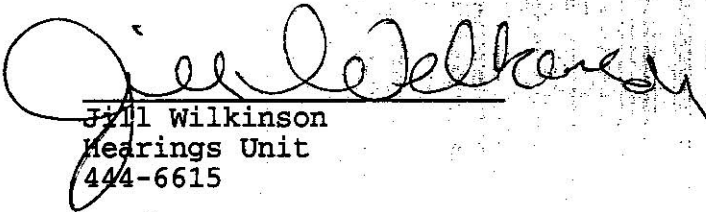
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